(2)

Supreme Court, U.S.
FILED
FEB 22 2002
OFFICE OF THE CLERK

No. 01-788

In the Supreme Court of the United States

EDWARD MAURICE COOPER,
a/k/a Hamid Abdul Wadud,
Petitioner,

v.

SHERYL HVASS,
Commissioner of Corrections, MN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Amy Klobuchar
Hennepin County Attorney

Donna J. Wolfson
Counsel of Record
Assistant County Attorney
Hennepin County Attorney's Office
C-2000 Government Center
Minneapolis, MN 55487
(612) 348-6764

Attorneys for Respondent

2002 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

2618

QUESTIONS PRESENTED

1. Was established precedent of this Court unreasonably applied in requiring Petitioner to prove that he was prejudiced by an absence of an interpreter at two-thirds of his pretrial meetings with defense counsel?

2. Was established precedent of this Court unreasonably applied in concluding that the trial court had no duty of inquiry, and therefore, Petitioner was required to prove that his attorney's representation was adversely affected by an actual conflict of interest?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES v

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

REASONS WHY THE PETITION SHOULD BE DENIED 1

I. Lack Of An Interpreter At Two-Thirds Of Petitioner's Pretrial Meetings With Counsel Is Not An Issue Warranting A Grant Of Certiorari 2

A. The State Court Findings 2

B. Strickland v. Washington Was Properly Applied To The Facts Of This Case 3

C. No Issue Of Public Import Supports A Grant Of Certiorari On This Question 6

II. The Simultaneous Representation By Defense Counsel's Partner Of Victim's Mother In A Near-Completed Divorce Action Is Not An Issue Warranting A Grant Of Certiorari 7

A. The State Court Findings 7

B. Given No Duty To Inquire, Cuyler v. Sullivan Was Properly Applied To The Facts Of This Case 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Federal Statutes

28 U.S.C. § 2254(e)(1) 2

Minnesota Cases

Cooper v. State, 565 N.W.2d 27 (Minn. Ct. App. 1997), rev. denied (Minn. August 5, 1997) 2

Federal Cases

Atley v. Ault, 191 F.3d 865 (8th Cir. 1999) 10

Cerro v. United States, 872 F.2d 780 (7th Cir. 1989) 11

Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) 4

Cuyler v. Sullivan, 446 U.S. 348 (1980) 8-10

Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989) 4

Hernandez v. Wainwright, 634 F. Supp. 241 (S.D. Fla. 1986), aff'd without op., 813 F.2d 409 (11th Cir. 1987) 6, 7

Holloway v. Arkansas, 435 U.S. 475 (1978) 8, 9, 11

Javor v. United States, 724 F.2d 831 (9th Cir. 1984) 4

Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984) 4

Mickens v. Taylor, 121 S.Ct. 1651, 2001 WL 348936 (U.S.) 9

Rushen v. Spain, 464 U.S. 114 (1983) 11

Strickland v. Washington, 466 U.S. 668 (1984) 3, 4

Tucker v. Day, 969 F.2d 155 (5th Cir. 1992) 4

United States v. Cronic, 466 U.S. 648 (1984) 4, 5

United States v. DiTommaso, 817 F.2d 201 (2nd Cir. 1987) 4

United States v. Mateo, 950 F.2d 44 (1st Cir. 1991) 4

Woods v. Georgia, 450 U.S. 261 (1981) 9

Foreign Jurisdictions

State v. Davis, 110 Ariz. 29, 514 P.2d 1025 (1973) 11

TABLE OF APPENDICES

Minnesota District Court's Order and Memorandum, September 30, 1993 ..... A-1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Minnesota Commissioner of Corrections, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's unpublished opinion in this case.

OPINIONS BELOW

In addition to the opinions set out in the petition, Respondent also cites to the following:

The Minnesota district court trial judge's post-trial order and memorandum dated September 30, 1993, (per Davis, J. (now Minnesota federal district judge)), denying Petitioner's motion for a new trial.

REASONS WHY THE PETITION SHOULD BE DENIED

On April 22, 1993, Petitioner abducted a 12-year-old girl at knifepoint from a playground. He dragged the child into a wooded area of the park and bound and gagged her. Thereafter, he committed multiple forms of penetration and forced the child to perform oral sex on him. Following a jury trial, Petitioner was convicted on three counts of first-degree criminal sexual conduct and one count of kidnapping. He received a modified sentence of 30 years.

The petition before this Court presents no conflict between decisions of various circuit courts of appeal. It offers no conflict of legal moment between the federal and Minnesota courts. It invokes no issue of federal law or of constitutional significance. Nor does it present issues with important public policy implications.

The facts are undisputed and both of Petitioner's Questions involve well-settled, clearly established precedents

of this Court. For both Questions, the resolution turns on which of several established legal tests should be applied to the facts. The courts below did not unreasonably or erroneously apply the law to the facts of record in denying Petitioner relief. Petitioner received a fair trial and this case does not warrant the error-correcting function of this Court.

Petitioner has not offered a compelling reason for a grant of certiorari required under Supreme Court Rule 10.

I. Lack Of An Interpreter At Two-Thirds Of Petitioner's Pretrial Meetings With Counsel Is Not An Issue Warranting A Grant Of Certiorari.

A. The State Court Findings.

Following an evidentiary hearing, the post-conviction court made detailed findings concerning the evidence. (Petitioner's Appendix at A-49-53). Thereafter, the Minnesota Court of Appeals summarized the findings relevant to Petitioner's claims Cooper v. State, 565 N.W.2d 27 (Minn. Ct. App. 1997), rev. denied (Minn. August 5, 1997) (Petitioner's Appendix at A-32-46). The state court findings are presumed to be correct on habeas review. 28 U.S.C. § 2254(e)(1). The findings concerning the use of an interpreter include the following:

> Cooper has been completely deaf since he was two and a half years old. He communicates primarily through American Sign Language (ASL). ASL is not simply English communicated through hand movements, but a significantly different language. Consequently, Cooper has a limited understanding of English and reads at only the third-grade level.
>
> * * *

> [T]he evidence shows: (1) when Cooper and the attorney [Redburn] were not assisted by an interpreter, they achieved some communication through writing; (2) a sign language interpreter was present at approximately one-third of the pretrial meetings between Cooper and his attorney, for a total of five hours; (3) in meetings with an interpreter, the attorney attempted to readdress issues he believed Cooper had had difficulty comprehending in previous, uninterpreted meetings; (4) the trial court provided interpreters for all of Cooper's court proceedings; (5) Cooper does not allege to have failed to understand any particular issues in his case or strategic decisions by his attorney; and (6) Cooper does not allege to have failed to communicate any piece of information, including the existence of exculpatory evidence, to his attorney.

(Petitioner's Appendix at A-34; A-38).

B. Strickland v. Washington Was Properly Applied To The Facts Of This Case.

The standard measure of attorney ineffectiveness is the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Under Strickland's first prong, to prevail on a claim of ineffective assistance of counsel a defendant must first show that his counsel's performance fell below an objective standard of reasonableness. With respect to the absence of an interpreter at two-thirds of Petitioner's pretrial meetings with counsel, the federal courts[1] concluded,

---

[1] Because the Eighth Circuit expressly relied on the "well-reasoned opinion of the district court," throughout this brief Respondent will refer generally to the decision of the federal courts and cite to the district court Order.

"Petitioner has not pointed to any aspect of his counsel's representation that fell below the standards set forth in Strickland." (Petitioner's Appendix at A-10).

Even if an attorney's representation falls below an objective standard of reasonableness, under the second prong in Strickland a defendant must still show there is a reasonable probability that, but for his attorney's professional errors, the results of the proceeding would have been different. In this case, Petitioner made no effort to prove that he was prejudiced by the absence of an interpreter, despite requests by the post-conviction court that he attempt do so (P.C.Tr.51-67). Instead, Petitioner unreasonably relied on this court's test in United States v. Cronic, 466 U.S. 648, 658-60 (1984) (a companion case to Strickland). Under Cronic, certain professional errors of counsel are legally presumed to be prejudicial, most commonly, those errors amounting to a constructive denial of counsel.[2]

A constructive denial of counsel exists when defense counsel is present, but literally does nothing; counsel remains silent and takes a "potted plant" approach to representation. The facts in this case do not even approach those in which a constructive denial of counsel has previously been found.

---

[2] Cases finding constructive denial of counsel include: Childress v. Johnson, 103 F.3d 1221, 1229-31 (5th Cir. 1997 (Cronic's "narrow exception to the requirement of prejudice" applied when defense counsel was present for guilty plea but was nothing more than a "potted plant."); Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (attorney present for sentencing, but so passive defendant unaware that attorney was present); United States v. Mateo, 950 F.2d 44, 49-50 (1st Cir. 1991) and Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (in both cases defendants rejected services of particular attorneys, without expressly waiving right to counsel; attorneys remained in courtroom but did nothing); United States v. DiTommaso, 817 F.2d 201, 215-16 (2nd Cir. 1987) and Javor v. United States, 724 F.2d 831, 833-34 (9th Cir. 1984) (in both cases defense counsel was alleged to have slept through portions of the trial); Martin v. Rose, 744 F.2d 1245, 1249-50 (6th Cir. 1984) (to protest several pretrial rulings, defense counsel refused to participate in the trial in any fashion).

Therefore, the federal courts properly rejected Petitioner's claim that he suffered a constructive denial of counsel so as to warrant a presumption of prejudice under Cronic.

Petitioner and his attorney met on eight occasions prior to the start of trial on July 28, 1993. Interpreters were utilized at three of those eight meetings, for a total of five hours. The sheer absence of an interpreter at five pre-trial meetings is the sole basis for Petitioner's claim that he was constructively denied counsel. Ironically, if Petitioner had *only* the three pretrial meetings with an interpreter for a total of five hours, there would be no question he would be required to establish prejudice.[3]

Moreover, Petitioner and present counsel of record also met without an interpreter, consulting on post-trial matters (August 31, 1993). (Appellant's Appendix in the Eighth Circuit, A-242). This fact underscores the importance of Strickland's prejudice prong to a resolution of the question in this case. Attorney representation is not a "numbers game." One meeting may be so crucially important that the absence of an interpreter would be prejudicial. On the other hand, five meetings without an interpreter, some indisputably in the nature of client "hand holding," may have no prejudicial effect. (P.C.Tr.48-49, 85, 97, 103-04). Because attorney-client meetings differ widely in their purpose and importance, it is appropriate to require a defendant to prove that the absence of an interpreter was prejudicial.

Neither a factual nor a legal basis supports Petitioner's claim of ineffective assistance, relief was properly denied, and the error-correcting function of this Court is not required.

---

[3] Contrary to the Petitioner's repeated allegations, there is no evidence of inadequate pretrial investigation, the Minnesota court expressly finding: "Cooper does not allege to have failed to communicate any piece of information, including the existence of exculpatory evidence, to his attorney." (Petition at i, 6; Petitioner's Appendix at A-38).

C. No Issue Of Public Import Supports A Grant Of Certiorari On This Question.

There is no legal or societal significance to this case. Nevertheless, Petitioner warns that the case has important legal and policy implications for defendants with a handicap in communication. Petitioner raises the alarm of a "frightening precedent," "a new silent precedent, the magnitude of which we cannot at this time perhaps imagine," including the elimination of court-appointed interpreters for deaf or foreign-speaking criminal defendants. (Petition at 15, 23). These claims are utterly without merit.

It is beyond dispute that a criminal defendant, whatever the communication deficit, has a statutory, if not a constitutional, right to an interpreter in all federal and Minnesota state court proceedings. Therefore, this case only stands for the following proposition:

> A defendant must establish that he was prejudiced by the absence of an interpreter from one or more pretrial meetings with his attorney to sustain a claim of ineffective assistance of counsel.

Clearly, the more significant the absence of interpretive services, (in terms of frequency, length, content, and purpose of uninterpreted meetings), and the more significant the defendant's communication deficit, (in terms of hearing, speech, and language), the more readily can prejudice be established. Contrary to Petitioner's claim, a defendant is not required "to calculate the harm" or "quantify the amount of prejudice." (Petition at 21). Rather, a defendant must simply establish that the results of the proceeding would have been different. This is not an unreasonable burden.

Moreover, there is nothing novel about the decision. In Hernandez v. Wainwright, 634 F. Supp. 241 (S.D. Fla. 1986), aff'd without op., 813 F.2d 409 (11th Cir. 1987), the court

rejected a claim of presumptive prejudice on similar facts. The Spanish-speaking defendant claimed inter alia ineffective assistance for his attorney's failure to use an interpreter at two of their three pretrial meetings. The Hernandez court rejected the claim, finding that defendant had failed to demonstrate "the requisite deficiency and prejudice for a claim of constitutional significance." 634 F.Supp. at 249.

The foregoing case, well over a decade old, has not resulted in dire consequences for those with communication deficits. Similarly, the instant case does not represent "new" or "frightening" precedent. Indeed, as an unpublished opinion it is no precedent at all. 8th Cir. R.28A(i).

II. The Simultaneous Representation By Defense Counsel's Partner Of Victim's Mother In A Near-Completed Divorce Action Is Not An Issue Warranting A Grant Of Certiorari.

A. The State Court Findings.

As to the alleged conflict of interest, the state court of appeals found:

> When the state called the victim's mother [Robinson] as its first witness, Cooper's attorney realized the witness was the client of a partner in his law firm. The attorney called a sidebar and advised the court and opposing counsel that his partner [Thurston] had represented the victim's mother in a completed divorce action. After a short discussion in chambers, the trial court asked both counsel whether they perceived a potential conflict, and both answered in the negative.
>
> * * *

> Meeting with both counsel outside the presence of the jury after Cooper's attorney recognized the victim's mother, the trial court learned: (1) a law partner of Cooper's attorney had represented the victim's mother; (2) the representation involved a dissolution action, which bore no relation to the present criminal case; (3) the dissolution action was complete; and (4) Cooper's attorney did not believe an impermissible conflict existed, but simply wished to bring the matter to the court's attention.

(Petitioner's Appendix at A-34; A-40-41).

B. Given No Duty To Inquire, Cuyler v. Sullivan Was Properly Applied To The Facts Of This Case.

Two tests govern a conflict of interest alleged to render the assistance of counsel ineffective. Depending on the test applied, a defendant may or may not be required to prove that he was adversely affected by an actual conflict of interest.

The first test is that set forth in Holloway v. Arkansas, 435 U.S. 475 (1978). Holloway applies when there is a timely objection by a defendant, or his counsel, to an alleged conflict of interest. In such an instance, the trial court must make an adequate inquiry to "ascertain whether the risk [is] too remote to warrant [new] counsel." Holloway v. Arkansas, 435 U.S. at 484. If an adequate inquiry into the presence of an actual conflict is not made, prejudice will be presumed and reversal is automatic. Holloway v. Arkansas, 435 U.S. at 490-91.

The second test, set forth in Cuyler v. Sullivan, 446 U.S. 348 (1980), applies when the trial court is not confronted with an objection, and neither knows, nor "reasonably should

know," of a potential conflict.[4] In such an instance, the defendant must demonstrate that "his counsel actively represented conflicting interests" which "adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. at 348-50.

In this case the federal courts concluded:

> [T]he nature of counsel's communication with the court did not trigger the duty of inquiry under Holloway." . . . [T]he facts related to the trial court in this case did not alert the court to any probable conflict that would require further inquiry. Both attorneys affirmed that they saw no potential conflict, and the trial court was entitled to rely on this representation. See Holloway, 435 U.S. at 485 (stating that attorneys are in the best position to advise the court of potential conflicts).

(Petitioner's Appendix at A-13). Accordingly, because Petitioner did not sustain his burden under Cuyler v. Sullivan of establishing an actual conflict that adversely affected his

---

[4] A third scenario exists when, despite the lack of an objection, the trial court reasonably should have known of a potential conflict and fails to conduct an inquiry. Woods v. Georgia, 450 U.S. 261 (1981). This Court recently granted certiorari in Mickens v. Taylor, 121 S.Ct. 1651, 2001 WL 348936 (U.S.), a capital case, to address the following limited question: Must a defendant "show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" Petitioner distinguishes Mickens v. Taylor by claiming that the instant case "focuses on the inquiry itself." (Petition at 26). However, in the instant case the federal courts found no duty to inquire, and therefore, the focus of the decision below was not on nature of the inquiry. Moreover, in Mickens, it was accepted, without deciding, that the trial court had a duty to inquire which it failed to discharge. Here no such duty of inquiry was found. The grant of certiorari in Mickens does not advance Petitioner's case before this Court.

lawyer's performance, his request for relief was properly denied.

The nature of the inquiry required is "necessarily case-specific," and, "in some cases, no inquiry may be required because all of the relevant facts have been disclosed to the court." Atley v. Ault, 191 F.3d 865, 872 (8th Cir. 1999). As this court explained in Cuyler v. Sullivan, 446 U.S. at 346-47:

> [N]othing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

In the instant case, defense counsel saw the victim's mother in person as she entered the courtroom to testify as the State's first witness. He immediately asked to approach the bench and a recess was taken in chambers (P.C.Tr.23-26). Defense counsel advised the court that one of his partners had previously represented the victim's mother in a divorce action. The prosecutor added that he understood from talking with the mother that the divorce had been completed some three years before.[5] This information did not put the trial

---

[5] It is not clear how the misunderstanding arose. The Robinson's had been separated for three years and apparently the prosecutor understood the divorce itself to have concluded three years before (P.C.Tr.5, 14-19, 32-33). Contrary to Petitioner's allegation, there was no

court on notice that "a particular conflict" existed necessitating an inquiry. To the contrary, both defense counsel and the prosecutor saw no "potential conflict." (T1.27-28).

The trial court reasonably relied on the assessments by the prosecutor and defense counsel. In Holloway this Court placed much emphasis on defense counsel's assessment of a potential conflict situation. Defense counsel is "'in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" Holloway, 435 U.S. at 485-86 (quoting State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)). This is especially true since "attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." Id. Indeed, as officers of the court, their statements to the court are essentially under oath. Id. No evidence in the record supports Petitioner's claim that his attorney could not discharge his ethical responsibility because he was incapable of "effectively analyz[ing] a conflict issue in the very brief but pressure-laden-in-chambers conference." (Petition at 29, n.7).[6]

---

evidence suggesting a "misrepresentation" on the part of the prosecutor or defense counsel. (Petition at 10).

[6] Although not incorporated into a Question Presented, Petitioner also asserts that he had a right to be informed about, and consent to, the alleged conflict. (Petition at 24-25). Petitioner had no such right. The evidence upon post-conviction wholly failed to establish that counsel's representation of Petitioner was materially limited by his responsibilities to another client, person, or to himself, so as to require Petitioner's informed consent. Minnesota Rules of Professional Conduct 1.7(b); Cerro v. United States, 872 F.2d 780, 787-88 (7th Cir. 1989) (no need to discuss potential conflict with defendant when court has ruled out the possibility). Moreover, the federal district court concluded that "[i]f the failure to secure petitioner's presence at this [in chambers] meeting was error, the error was harmless. *See* Rushen v. Spain, 464 U.S. 114, 117 n.2 (1983) (explaining that harmless error analysis applies to violations of the right to be present at critical stages of the trial.)" (Petitioner's Appendix at A-8-9,

Moreover, the trial court itself had an opportunity to revisit the issue upon Petitioner's motion for a new trial. Presented with more accurate information about the timing of the partner's legal representation, the trial judge, Hon. Michael J. Davis, found no conflict of interest and denied Petitioner's motion for a new trial (Respondent's Appendix at A-6-7). Subsequently, the grant of a post-conviction evidentiary hearing before the Hon. Kevin S. Burke enabled Petitioner to conduct a full inquiry. No facts supporting an actual conflict were ever developed, despite having the testimony of witness Robinson, as well as attorneys, Redburn and Thurston. Nor was there any evidence produced that the performance of Petitioner's attorney was adversely affected.

The trial court had no duty to inquire based on the information presented to it by counsel on the first day of trial. Moreover, further judicial inquiry revealed neither an actual conflict nor an adverse effect on counsel's representation. Because Petitioner's right to conflict-free representation was never compromised, relief was properly denied, and the error-correcting function of this Court is not required.

A-14). This issue was not included in Petitioner's Certificate of Appealability, and therefore, was not given further consideration by the Eighth Circuit. (Petitioner's Appendix at A-2-3, A-6). For the foregoing reasons, Petitioner's continuing references to the lack of informed consent do not merit this Court's review.

CONCLUSION

The Sixth Amendment to the Constitution guarantees the right to the effective assistance of counsel, assistance effective enough to ensure a fair trial. Accordingly, the petition for writ of certiorari should be denied. Petitioner has not demonstrated that the courts below made an unreasonable application of established Supreme Court precedent. This case offers no conflicting decisions among the circuit courts of appeal, no issue of federal law or constitutional significance, and no matter of public import, requiring this Court's review. Petitioner received a fair trial.

DATED: February 22, 2002 Respectfully submitted,

AMY KLOBUCHAR
Hennepin County Attorney

By: DONNA J. WOLFSON
Counsel of Record
Assistant County Attorney
Attorney License No. 118576
C-2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-6764
FAX: (612) 348-6028

Attorneys for Respondent

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs. **ORDER**

Edward Maurice Cooper, SIP No. 93030428
C.A. No. 93-1466

Defendant.

The above-entitled matter came on for hearing before the Honorable Michael J. Davis, Judge of District Court, on September 30, 1993.

James K. Appleby, Esq., appeared for and on behalf of Plaintiff.

Albert T. Goins, Sr., Esq., appeared for and on behalf of Defendant.

Based upon all the files, records, and proceedings herein, together with arguments of counsel, and the Court being duly advised in the premises,

IT IS HEREBY ORDERED:

1. That Defendant's motions are denied in their entirety.

2. That the attached Memorandum is incorporated herein by this reference.

Dated: 9-30, 1993

BY THE COURT

s/
Michael J. Davis
Judge of District Court

MEMORANDUM

On April 22, 1993, defendant abducted a twelve-year old girl at knifepoint in Bass Creek Park. The defendant dragged the victim into a wooded area of the park and forced cotton gauze into her mouth and then taped her mouth shut with electrical tape. The defendant then tied the victim up with wire and removed her pants. He then proceeded to penetrate her vagina with his penis, his fingers and his tongue. Thereafter, the defendant removed the tape and gauze from the victim's mouth and forced her to perform oral sex on him and to kiss him before fleeing the area.

On August 2, 1993, the defendant was convicted by a Hennepin County jury of three counts of Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, Subds. 1(a), (d), and (e) (i), and one count of Kidnapping in violation of Minn.Stat. § 609.25, subd. 2(1).

The court was originally schedule to impose sentence on September 9, 1993. Prior to the sentencing hearing, the State moved the court to order statutory maximum sentences for the criminal sexual conduct and kidnapping and for the sentences to run consecutively. At the sentencing hearing, the defendant informed the court that he was not happy with his attorney, and that he be allowed to substitute counsel. David T. Redburn was given permission to withdraw, and Albert T. Goins was substituted in his place. The court continued the sentencing until September 30, 1993 to allow defense counsel the opportunity to respond to the State's motion for an upward departure.

On September 23, 1993, the defendant served his motions for a new trial, to vacate the judgment of conviction or in the alternative for a writ of error coram nobis. For the reasons stated below, defendant's motion are denied in their entirety.

1. Motions for a new trial and to vacate the judgment of conviction.

Rule 26.04, Subd. 1(3) of the Minnesota Rules of Criminal Procedure provides a notice of a motion for a new trial shall be served within fifteen (15) days after verdict or finding of guilty. Similarly, a motion to vacate judgment of conviction must be served within fifteen (15) days after verdict or finding of guilty. Minn.R.Crim.P. 26.04, Subd. 2. The jury returned its verdict of guilty against the defendant on August 2, 1993. The deadline to file motions for a new trial or to vacate judgment was August 17, 1993. The defendant served his motions on September 23, 1993, therefore they are not timely. The court may not extend the time for taking any action under Rule 26.04, Subd. 1(3) or Subd. 2.

The defendant argues denial of these motions violates his due process rights. This argument is without merit. The defendant has relief available through post-conviction relief or through a direct appeal. Minn.Stat. § 590.01, Subd. 1 provides:

> Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United State or of the state, may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate.

As this provision illustrates, the claims now made by the defendant can all be made through post-conviction relief.

Furthermore, direct appellate relief is available ninety (90) days after final judgment or entry of the order appealed. Minn.R.Crim.P. 28.02, Subd. 4(3). In this case, the opportunity to appeal is available to the defendant until the beginning of November 1993.

As the motions for new trial and to vacate judgment are untimely, and the denial of such motions do not deny defendant due process, such motions must be denied.

2. Motion for a writ of coram nobis.

The writ of coram nobis is a device used in common law to correct errors of fact in felony cases as well as civil cases. State v. Tellock, 264 Minn. 185, 188, 118 N.W.2d 347, 352 (1962). However, this writ is only available to criminal defendants in extraordinary circumstances. Id.

The post-conviction relief statute, Minn. Stat. § 590.01, Subd. 2 provides:

> This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in the place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

As stated above, the relief sought by defendant in his motions are available through post-conviction relief as provided in Minn.Stat. § 590 et. seq. Defendant has made no showing that section 590 is "inadequate or ineffective to test the legality of the conviction". Accordingly, defendant's motion for a writ of error coram nobis is denied as such relief has been superseded by Minn.Stat. § 590.

Even if the writ of error coram nobis were available to defendant herein, his motion must nonetheless be denied. In

Tellock, the court discussed the scope of the writ of error coram nobis:

> In modern practice, the writ of error coram nobis may be defined as a common-law writ issuing out of a court of record to review and correct a judgment of its own relating to some error in fact as opposed to error of law, not appearing on the face of the record, unknown at the time without fault to the court and to the parties seeking relief, but for which the judgment would not have been entered. Id., quoting, New England Furniture & Carpet Co. v. Willcuts, 55 F.2d 983, 987.

The court went on to state:

> If the petition fails to state an error of fact which, if brought to the attention of the court, could have led to a different judgment, it is insufficient to invoke the writ. Id., citing, State v. Kubus, 243 Minn. 379, 382, 68 N.W. 2d 217, 219, cert. denied, 349 U.S. 959, 75 S.Ct. 889, 99 L.ed. 1282.

Defendant's motion for a writ of error coram nobis is based upon the following facts: negative DNA testing results not introduced at trial; state witnesses indicated their testimony was coerced or the product of promises; alibi witnesses were not called to testify at trial; impact of defendant testimony; and defense counsel was representing the victim's mother during the time of trial.

A writ of coram nobis is not available to question the adequacy of counsel or the right to a new trial based on newly discovered evidence. Tellock, 264 Minn. at 194. Therefore, defendant's claims as to failure to call alibi witnesses, the impact of defendant's testimony and coercion of state's

witnesses are specifically excluded from the scope of this writ.

Nor is there merit to defendant's claim regarding DNA evidence. As testified to by Susan Weston-Kirkegaard at trial, no DNA testing was done. There were no DNA tests with negative or inconclusive results.

The conflict of interest claim must also fail. Defendant's first counsel, David Redburn, is a member of the firm Thurston, Redburn and Johnson, P.A. Steven Thurston represented the mother of the victim in divorce proceedings. The Judgment and Decree was filed on May 17, 1993. The J & D provided counsel would cease to be the attorney of record ninety-one days after the entry of the J & D. Technically, Steven Thurston did represent the victim's mother at the time of the trial in this matter. Mr. Redburn notified the court and the State of his partner's representation of the victim's mother during trial and it was determined that this did not create a conflict as Mr. Redburn was not involved in the divorce proceedings. Defendant now contends that Mr. Redburn never notified him of Mr. Thurston's representation of the victim's mother.

If defendant was not informed his counsel's partner represented the victim's mother, such representation does not create a conflict of interest that prejudiced defendant's right to a fair trial. In Burger v. Kemp, 107 S.Ct. 3114, 3120 (1987), the Court held that a conflict of interest is prejudicial "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance." (citations omitted). In State v. Stephani, 369 N.W.2d 540 (Minn.App. 1985), defendant was on trial for criminal sexual conduct. Just before trial, defense counsel learned that someone from his office had represented the victim in unrelated prostitution case and that one of the cases was occurred while the case at issue was pending. The victim's attorney interviewed the victim about the case at issue but

told her not to talk about the other cases. Defense counsel just told the victim to "go to court and tell the truth". Counsel for the victim was not associated with the defendant's case in any way. The court held no actual conflict of interest existed that deprived the defendant of this Sixth Amendment right to counsel.

In this case, David Redburn was not associated in the victim's mother's divorce case, nor was his partner, Mr. Thurston involved in the defense of defendant. The divorce decree was entered into over two months prior to the commencement of trial. Based on these facts, no conflict of interest exists that deprived defendant of his sixth Amendment right to counsel.

Defendant has not provided the court a basis upon which to issue a writ of error coram nobis if such relief were available. The claims currently before this court must be raised through either direct appeal or through post-conviction relief as provided by Minn.Stat. § 590 et. seq.

M.J.D.